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**Local 147, Laborers' International Union of North America (Northeast Remsco Construction, Inc.) and Richard Bacquie.** Case 02–CB–231600

October 2, 2020

**DECISION AND ORDER**

BY CHAIRMAN RING AND MEMBERS EMANUEL  
AND MCFERRAN

On March 25, 2020, Administrative Law Judge Lauren Esposito issued the attached decision. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The recommended Order of the administrative law judge is adopted and the amended complaint is dismissed.

Dated, Washington, D.C. October 2, 2020

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John F. Ring, Chairman

\_\_\_\_\_  
William J. Emanuel, Member

<sup>1</sup> The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Charging Party's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Charging Party's contentions are without merit.

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Lauren McFerran,

\_\_\_\_\_  
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Nikhil A. Shimpi, Esq., for the General Counsel.

Marianne Manning Russo, Esq. (Manning & Russo, LLP), of Bronxville, New York, and Ira Sturm, Esq. (Raab, Sturm & Ganchrow, LLP), of Fort Lee, New Jersey for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

LAUREN ESPOSITO, Administrative Law Judge. This case was tried before me in New York, New York, on September 4 through 6, 2019, October 10, 2019, and November 1, 2019. On November 23, 2018, Richard Bacquie filed a charge in Case 2–CB–231600, which he amended on March 29, 2019, against Local 147, Laborers' International Union of North America (Local 147 or the Union). On August 2, 2019, the Regional Director, Region 2, issued an Amended Complaint and Notice of Hearing alleging that on September 23 and October 28, 2018, Local 147 violated Section 8(b)(1)(A) of the Act by threatening employees that they would no longer obtain employment, including by loss of Union membership, because they complained about racial discrimination in the Union's referral of members to work.<sup>1</sup> Local 147 filed an Answer on August 15, 2019 denying the Amended Complaint's material allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel (General Counsel) and Local 147, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

General Counsel and Local 147 have stipulated that Northeast Remsco Construction, Inc. (Remsco), a corporation with an office and place of business in South Farmingdale, New Jersey, and a member of the General Contractors Association of New York, Inc. (GCA), has at all material times been engaged in the construction business as a utility and transportation contractor. (Jt. Exh. 1.) General Counsel and Local 147 have stipulated and I find that in conducting its operations, Remsco annually

<sup>1</sup> The amended complaint also alleged at par. 5(b) that on September 23, 2018, Local 147, by its agent Joseph Fitzsimmons, intentionally pushed and threatened employees with bodily harm because they complained to Local 147 about racial discrimination in the Union's referral of members to work. General Counsel withdrew this allegation on the record on September 4, 2019. Tr. 17. General Counsel subsequently withdrew the allegation contained in par. 4 of the Amended Complaint that Joseph Fitzsimmons is an agent of Local 147 pursuant to Sec. 2(13) of the Act in his Posthearing Br. at p. 1.

performs services valued in excess of \$50,000 in states other than the State of New York. General Counsel and Local 147 have further stipulated that the GCA has been at all material times an organization comprised of various employers performing construction services in the State of New York, and has represented its members in multiemployer negotiations of collective bargaining agreements, including a collective bargaining agreement with Local 147. Based upon the foregoing, I find, consonant with the parties' stipulation, that Remsco is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. *Siemons Mailing Service*, 122 NLRB 81 (1959); *Laundry Owners Assn. of Greater Cincinnati*, 123 NLRB 543 (1959).

Local 147 has not admitted labor organization status. However, based upon the above stipulation between General Counsel and the Union, and the evidence that Local 147 negotiates collective bargaining agreements with employers and multi-employer associations, including the GCA, I find that Local 147 exists for the purpose of "dealing with" employers regarding matters including "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work," and is therefore a labor organization within the meaning of Section 2(5) of the Act. (See Tr. 34, 231; Jt. Exh. 1; GC Exh. 2, 3, 4); *Vencare Ancillary Services*, 334 NLRB 965, 969 (2001).

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Local 147's Operations

Local 147 represents employees who work in tunnel construction and mining in the New York City area. Tr. 34, 231. Local 147 has collective bargaining agreements with construction industry employers, including a multiemployer agreement with the GCA. (Jt. Exh. 1; GC Exhs 2–3.) Local 147's offices are located at 4332 Katonah Avenue, between 235th Street and 236th Street, in the Bronx, New York. Tr. 457. In 2018 and 2019, Local 147 had three full-time employees—Chris Fitzsimmons, Richard Fitzsimmons, Sr., and John Ryan—and one part-time office manager, Cindy Fitzsimmons. Tr. 554–555. Richard Fitzsimmons, Jr. also works at Local 147's offices for a few weeks each year, covering for other staff members. Tr. 577–579.

Pursuant to article IV, section H of the LIUNA Uniform Local Union Constitution,<sup>2</sup> the Local 147 Executive Board consists of the Union's president, vice president, recording secretary, secretary-treasurer, business manager, and two other board members elected by the membership. (GC Exh. 4, p. 87.) The Local 147 Constitution vests the Executive Board with the authority of the Local Union between meetings, and provides that the Executive Board's actions shall be binding unless modified by a membership vote. GC Exh. 4, p. 87. The Executive Board also comprises the trial board to hear and decide all internal union charges, and to ensure that the business of the Local Union is properly conducted in accordance with the Constitution. (GC Exh. 4, p. 88, 105–106.) The Executive Board appoints Field Representatives or Organizers as necessary and establishes their

salary and compensation. (GC Exh. 4, p. 88.)

At all times material to the events at issue in this case, John Ryan has been the President of Local 147, Andrew Hickey has been the Vice President, Gerard Schnell has been the Recording Secretary, and Richard Fitzsimmons, Sr. has been the Business Manager. Tr. 45, 458, 552. Chris Fitzsimmons has been Local 147's Financial Secretary-Treasurer since approximately 2013. (Tr. 45, 456–457.) Richard Fitzsimmons, Jr. is the Sergeant-at-Arms. Tr. 45, 552. Mike O'Shea and Andrew Joseph are also Executive Board members. (Tr. 551–552.) Richard Fitzsimmons, Sr. and Chris Fitzsimmons are brothers. (Tr. 45, 551.) Richard Fitzsimmons, Jr. and Joseph Fitzsimmons are Richard Fitzsimmons, Sr.'s sons, and Chris Fitzsimmons' nephews. Tr. 45–46, 551, 579.

As Financial Secretary-Treasurer, Chris Fitzsimmons is responsible for the collection of dues and employer contributions, addressing issues regarding investments and insurance policies, maintaining Local 147's financial records, and general secretarial duties as defined in the local constitution. (Tr. 457.) Members coming to pay dues at the office meet with Chris,<sup>3</sup> sitting on chairs next to his desk. Chris testified that he is also generally the individual who assists members who visit the office seeking information and documents or signing up for the out-of-work list.<sup>4</sup> (Tr. 459.) Chris also responds to members' questions submitted by email. (Tr. 460–461.) Members who call the Local 147 office generally speak with Ryan, Richard Fitzsimmons, Jr., or Chris Fitzsimmons. (Tr. 460.)

Richard Fitzsimmons, Jr. testified that he has been a member of Local 147 for approximately 15 years and is an elected Sergeant-at-Arms. (Tr. 569.) In that position, he is a non-voting member of the Executive Board, and while he attends executive board meetings, he can only speak at these meetings if called upon. (Tr. 552, 569, 579–580.) Article IV, section 4(F) of the Constitution provides that the Sergeant-at-Arms "shall determine the right of those who shall be permitted to enter the meeting hall," and "shall execute such orders received from the President for the maintenance of order and decorum at meetings." (GC Exh. 4, p. 86.) Richard, Jr. testified that the Sergeant-at-Arms maintains order at Union meetings by issuing two warnings to individuals who are disruptive, and ejecting members who fail to comply. (Tr. 569, 576–577.) The Sergeant-at-Arms also tallies the number of members at each monthly membership meeting, reporting this information to the Recording Secretary. (Tr. 578–579.)

Charging Party Richard Bacquie and Local 147 member Tyronne Wallace testified at the hearing for the General Counsel. Tr. 229–230. Chris Fitzsimmons and Richard Fitzsimmons, Jr. testified on Local 147's case, as did Thomas J. Smith, a senior health and safety specialist for the New York State Laborers' Health and Safety Trust Fund. Tr. 597. Michael Hunter, a foreman at Remsco from July to November 2018, was also called as

<sup>2</sup> There is no dispute that Local 147 operates pursuant to the LIUNA Uniform Local Union Constitution.

<sup>3</sup> Because a number of the personae involved in the pertinent events are members of the Fitzsimmons family, I will often refer to them solely by their first names for the purposes of clarity and brevity.

<sup>4</sup> On the wall directly behind the chairs near Chris Fitzsimmons' workstation is a bulletin board above some filing cabinets, where Local 147 posts its workers compensation information, the Union's out-of-work list, the out-of-work list rules, and other internal Union policies. (Tr. 43, 239–240, 459.)

a witness by Local 147. (Tr. 217–218.)

*B. Interactions Between Bacquie and the Local 147 Executive Board Prior to the Fall 2018 Union Meetings*

Richard Bacquie has been a member of Local 147 in good standing since January 1998. (Tr. 33.) Other members of Bacquie's family have been members of Local 147 and have worked in the trade, including Bacquie's father and nephew. Tr. 297–298, 300–301. He has never served as a shop steward or other representative for the Union. Tr. 34. Bacquie has worked for a number of employers subject to collective bargaining agreements with Local 147, including Schiavone Construction in 2004, and Frontier-Kemper in 2014. Tr. 35–36. Bacquie most recently worked for Remsco from March to September 2018. (Tr. 47–48.)

Local 147 refers members to available jobs in the trade via its out-of-work list. (Tr. 39, 328, 329–330; GC Exh. 6.) Bacquie testified that he placed his name on the out-of-work list on one occasion in October 2018, by visiting Local 147's office and writing his name and contact information in a book. (Tr. 41, 330–331.) Bacquie testified that until the hearing in the instant case, he was not aware that rules existed for the out-of-work list. (Tr. 41, 329–330.)

In the spring of 2016, Bacquie requested a copy of Local 147's constitution and grievance procedures in connection with a layoff from Frontier-Kemper and issues with a union-appointed auditor and the shop steward on the job. (Tr. 40–41, 462–464.) On March 8 and 9, 2016, Bacquie and Chris Fitzsimmons exchanged several e-mails regarding Bacquie's request for documents. (Tr. 464–465; R.S. Exh. 10.) On March 8, 2016, Chris Fitzsimmons sent an e-mail to Bacquie attaching Local 147's then-current collective bargaining agreement with the GCA and providing a link to the LIUNA website leading to the constitution, with instructions regarding the use of the link. Chris further explained that Local 147 follows the bylaws in the uniform local constitution contained on the website, and that the constitution describes Local 147 Executive Board positions, qualifications, and functions, as well as grievance procedures. Chris stated that he would also locate materials which would describe interim Executive Board appointments, noting that while Bacquie's request had been forwarded to Local 147's attorney, he wanted to provide Bacquie with access to the requested information without document reproduction charges. Finally, Chris invited Bacquie to call him once Bacquie had been able to review the documents. (R.S. Exh. 10.) Bacquie responded later that day, stating that referral of his request to an attorney "validate[d]" his concerns regarding discrimination in obtaining future employment, and questioning the qualifications and interests of the appointed auditor. (R.S. Exh. 10.) Chris stated in response that he was only attempting to gather the information Bacquie had requested, and that having gained a better understanding of Bacquie's issues he intended to "work toward a resolution." (R.S. Exh. 10.) The next day, Bacquie stated that he had not received all of the information he sought and requested an extension of "my right to a grievance" as a result. Bacquie again protested the auditor's conduct in purportedly providing information that Bacquie "abused"

an employee of Frontier-Kemper and asserted "a claim of violation" against the Local 147 shop steward. Finally, Bacquie requested a meeting with Chris, Richard Fitzsimmons, Sr., and John Ryan. (R.S. Exh. 10.) Chris responded an hour later, stating that he was continuing to gather the requested documents and would attempt to arrange a meeting. (R.S. Exh. 10.) After a meeting between Local 147, Bacquie, and representatives of Frontier-Kemper, the issues raised by Bacquie were resolved. (Tr. 478–479.)

Bacquie testified that in April 2018 he learned that Local 147 members from a project he had previously worked on were working at another jobsite, even though the Local 147 shop steward on the project had told him that there was no work available. (Tr. 49–50.) He called Chris Fitzsimmons and described the situation to him, telling Chris that white employees were continuing to work and assigned the day shift, whereas black and other non-white employees were being laid off and assigned later shifts. (Tr. 50–51.) Bacquie testified that when he identified a specific member involved, Chris stated, "You know how he's getting work," which according to Bacquie referred to the member's relationship with Local 147 President John Ryan. (Tr. 51–52.) Bacquie told Chris that if the problem was not addressed, he intended to write an official grievance, and Chris stated that an official grievance would provide employers with ammunition against the Union. (Tr. 52.) Bacquie told Chris Fitzsimmons that he should find a way to resolve the issue if he did not want a grievance filed. (Tr. 52–53.)

Subsequently Bacquie and Chris Fitzsimmons exchanged a number of text messages between August 13, 2018 and September 23, 2018.<sup>5</sup> (Tr. 53–62; GC Exh. 7; R.S. Exh. 2.) Bacquie began this exchange on August 13, by recounting incidents of "bias and very selective treatment" in hiring that he had discovered and asking for information regarding the process for filing a grievance and appealing in the event that the grievance was denied. Chris responded that he was only aware of one job in the Union's jurisdiction, which employed eight members, and stated that if a relative of Ryan's was working he did not obtain the job through the Local 147 out-of-work list. Chris told Bacquie that he would be available in the Union office the next day if Bacquie wished to discuss the issue further. Bacquie responded that he would call Chris, and asked Chris to forward him the grievance process. Chris then sent Bacquie a series of news articles regarding various contractors in the industry and their opposition to the Union. Chris said that he would call Bacquie the next day.

On September 11, Bacquie and Chris Fitzsimmons sent one another the following text messages:

Bacquie: Chris you lied to me again, your brother lied to the membership and John Ryan told the wrong person.

Chris: Not sure what you are talking about. I'll be in the office tomorrow.

Bacquie: I know, Chris, everyone plays ignorant till the shit hits the fan.

<sup>5</sup> All subsequent dates are in 2018 unless otherwise indicated.

GC Exh. 7 (punctuation and capitalization added for clarity).

On September 19, Bacquie sent Local 147 a letter listing a number of issues he wished to address “in a matter that is reasonable to the entire membership,” including “racial discrimination,” “discriminating hiring practice,” and “unqualified and bias[ed] shop stewards.” (Tr. 63–64; GC Exh. 8.) Bacquie also stated that he wished to address the grievance policy, “how to file in detail and appeal[s] process,” a “fairer system for members laid off and out of work,” “appointments to Administration Positions” which “disenfranchised members opportunities,” “lack of on-site representation” by business agents,” and members’ “lack of information to fair hiring process” and “fear of retaliation” by the Union administration. (GC Exh. 8.) Bacquie stated that “the Administration favors friends and family who are not as tenured within the local, are under qualified and/or not qualified at all.” (GC Exh. 8.) Bacquie requested that Local 147 provide copies of documents including the Union’s bylaws, Constitution, “and any rules, policies, codes of conduct, amendments, contracts and alike.” (GC Exh. 8.) Bacquie further stated, “This is my second letter and I have twice requested verbally for the accurate process of filing grievances which has been ignored in prior attempts. I will if need be forward this letter along with a written letter to the International requesting this information if I do not receive a response within 10 working days.” (GC Exh. 8.)

### *C. The September 23 Union Meeting*

Local 147 conducts membership meetings the last Sunday of each month. (Tr. 577.) Membership meetings take place at a meeting hall in a building owned by Local 237 of the International Brotherhood of Teamsters on 14th Street between 7<sup>th</sup> and 8th Avenues in Manhattan. (Tr. 43, 65–66.) The Union’s Executive Board meets an hour prior to the membership meetings. (Tr. 577.)

The meeting hall is a large room with entrance and exit doors on either side. (Tr. 66.) The Local 147 administration sits at a table facing the membership. (Tr. 66.) Chairs for the members are set up facing the table where the administration sits, and between the members’ chairs and the administration’s table is a podium for speakers, which faces the chairs.<sup>6</sup> (Tr. 66–67.) Small tables are placed near the entrance and exit doors. Tr. 66. There are bathrooms adjacent to the entrance and exit signs. (Tr. 66.)

There is no dispute that the September 23 meeting was attended by members of the Local 147 Executive Board, including John Ryan, Chris Fitzsimmons, and Richard Fitzsimmons, Sr. and Jr. (Tr. 553, 569.) The evidence establishes that the September 23 meeting proceeded in the manner typical of Local 147’s membership meetings, with a series of reports to the membership from the Union’s Business Manager and various shop stewards, discussing the current jobs covered by Union contracts and the number of workers employed. (Tr. 493–94.) Bacquie attended the meeting, as did Local 147 member Thomas J. Smith. (Tr. 65–66, 599.) Bacquie testified that during a presentation at the meeting regarding the provisions of a new collective

bargaining agreement, he asked a question regarding the criteria for holiday pay. (Tr. 67–68.) Bacquie testified that Chris Fitzsimmons responded to his question, explaining the new contract’s terms regarding holiday pay, but was “very loud” and “aggressive in his tone” when doing so. (Tr. 68–69.) Bacquie testified that Chris Fitzsimmons “was, in my opinion, super assertive and directing it to me,” so that Bacquie “took it offensively.” Tr. 68–69. Bacquie testified that at that point he began recording the meeting on his phone, which he had placed in either his jacket pocket or his back pants pocket. (Tr. 161, 399.) A copy of the recording and a transcript prepared by General Counsel were introduced into evidence during the hearing. (Tr. 69, 190–191; GC Exh. 16(a-b).)

The recording of the September 23 meeting begins with a presentation regarding the provisions of the new collective bargaining agreement and legislation potentially affecting the membership. (GC Exh. 16(a) (not transcribed).) Bacquie testified that later, “I tried to get up and ask a question...related to the letter I sent in,” but “was disregarded” and “left the room.” (Tr. 67–68, 69.) The recording Bacquie made appears to contain a discussion of the letter from approximately 49:35 to 50:15, after the meeting ended. Bacquie states that “we need to talk,” and the individual to whom he was speaking responds that they have not seen his letter, but would read it, after which they would have a discussion. This portion of the recording is not transcribed, and I am not able to identify the voice of the person to whom Bacquie was speaking. (Tr. 69; GC 16(a-b).)

It is undisputed that Bacquie then walked up to Chris Fitzsimmons, who was in front of the podium, and the two had the following exchange:

Chris: What’s up Rich?

Bacquie: What’s up man? You had like an attitude?

Chris: I don’t have an attitude, man. I just, we’re just trying to get through some difficult stuff.

Bacquie: I understand you’re trying to get through difficult stuff but if there’s questions these guys don’t understand it because I didn’t even understand it neither.

Chris: OK, you understand it now?

Bacquie: Yeah, but what’s your attitude?

Chris: There’s no attitude!

Bacquie: You’re giving me one right now, though. What’s up? We’ve never been like that.

Chris: I’m not giving you attitude.

Bacquie: Because I’m fucking asking for some information, is there a problem?

Chris: You, you want a copy of it?

Bacquie: I don’t need a copy of that, that’s not what I’m asking you for.

<sup>6</sup> Wallace testified that there is a camera in the meeting hall which faces the podium. Tr. 232, 256–257. No video recordings of the meetings were introduced into evidence at the hearing.

Chris: Here you go.

(GC Exhs. 16(a) at 51:54–52:19, 16(b), p. 1–2.)

From there, the situation escalated somewhat. Bacquie told Chris repeatedly, “I’ll see you in the [Union] hall,” which Chris stated that he interpreted as bullying and threatening.<sup>7</sup> (GC Exh. 16(a), 16(b), p. 2.) However, Chris’ tone at this point was firm but relatively calm. (GC Exh. 16(a) at 52:25.) Chris stated to Bacquie that the “problems” that he had raised were unrelated to Chris’ duties as Financial Secretary-Treasurer, which consisted primarily of bookkeeping and record keeping. Tr. 72; (GC Exh. 16(a), 16(b), p. 2–3.) At that point, Bacquie accused Chris of having disregarded the Local 147 bylaws. GC Exh. 16(a) at 52:45, 16(b), p. 2–3.) When Bacquie continued to insist that Chris’ conduct has contravened the bylaws in some way, Chris responded, “OK Richie, I can see we have a difference of opinion.” (GC Exh. 16(a) at 52:59, 16(b), p. 3.) Bacquie then stated, in a noticeably louder tone, “No, we definitely have a difference of opinion, definitely.” (GC Exh. 16(a) at 53:05, 16(b), p. 3.)

Chris Fitzsimmons then said, “What, you got a problem with me?” (GC Exh. 16(a) at 53:08, 16(b), p. 3.) Chris spoke more quickly than he had been previously, and his tone was more abrupt, but his voice was not significantly louder than the volume that either he or Bacquie had previously been using. (GC Exh. 16(a).) Bacquie testified that at that point Chris “put his hands up” in a “fighting” or “threatening” stance. (Tr. 71.) Bacquie responded by stating, in an intensified tone and at a distinctly raised volume, “What, you threatening me?” (GC Exh. 16(a) at 53:09, 16(b), p. 3.) Chris replied in a more conversational tone, “No, I’m asking you if you have a problem with me. Richie, you seem like you got a problem with me.” (GC Exh. 16(a), 16(b), p. 3.)

At this point, Joseph Fitzsimmons and a number of other members approached Bacquie and Chris Fitzsimmons. (Tr. 72–73.) Joseph Fitzsimmons referred to Bacquie as “coming around and starting fucking trouble,” and told Bacquie, “Get the fuck outta here,” and “Get the fuck out!” (GC Exh. 16(a) at 53:10, et seq., 16(b), p. 3.) Chris Fitzsimmons repeatedly stated, “Let’s keep order,” and Bacquie called for Rich Fitzsimmons, Jr., as the Sergeant-at-Arms, to “check” Joseph. (GC Exh. 16(a) at 53:30, 16(b), p. 3–4.) Bacquie testified that as “The membership pulled me back...closer to the door area,”<sup>8</sup> Joseph Fitzsimmons stated that Bacquie was “dead” and “done in the union,” after which Richard, Jr. stated that Bacquie was “done in the union” and “won’t work again.” (Tr. 73–74.) These statements, however, cannot be heard on the recording made by Bacquie and do not appear in the transcript prepared by General Counsel. (GC Exh. 16(a), 16(b), p. 3–4.) Instead, after Chris Fitzsimmons and Thomas Smith attempt to calm the situation, Richard Fitzsimmons, Jr. states, “Enough of your shit!” after which Bacquie and

Richard, Jr. trade insults. (GC Exh. 16(a), 16(b), p. 4.) The transcript then proceeds as follows:

Richard Fitzsimmons, Jr.: . . . Back up motherfucker. . .

Bacquie: Y’all, let’s come, come, come. Let’s take it outside.

Unidentified male voice: Rich, Rich!

Joseph Fitzsimmons: [Indistinct]

Richard Fitzsimmons, Jr.: [Indistinct]

Bacquie: . . . Come, come, come . . .

Richard Fitzsimmons, Jr.: [Indistinct] You’re done! Get the fuck out of here.

Unidentified male voice: Rich, Rich!

[Crosstalk]

Bacquie: I’m done?

GC Exh. 16(a) at 53:50–53:54, 16(b), p. 4.)

After additional rancorous discussion punctuated by Bacquie’s incitements to physical combat<sup>9</sup> and other members’ attempts to calm him down,<sup>10</sup> the group exited the meeting room into the hallway, and then proceeded into the street. Tr. 74–76; GC Exh. 16(a), 16(b), p. 4–7.) The evening ended with Bacquie determined to “smack up” Richard Fitzsimmons, Sr. and Jr., and “go to the International” before the recording ends. (GC Exh. 16(a), 16(b), p. 7–8.)

Richard Fitzsimmons, Jr. testified regarding the September 23 meeting, where he served as Sergeant-at-Arms for the Union. Richard Jr. stated that as he stood at the door closest to the podium, about five feet away, he saw Bacquie asking Chris Fitzsimmons a few questions. (Tr. 569–570.) Richard Jr. testified that he observed the argument become heated, and when Bacquie removed his glasses Richard Jr. believed that the confrontation might become physical. (Tr. 570.) Richard Jr. testified that he approached Bacquie and Chris at that point. (Tr. 571.) Richard Jr. testified that he did not tell Bacquie that he would no longer obtain employment, including by the loss of Union membership. (Tr. 571.) Richard Jr. testified that he directed Bacquie to leave the meeting hall, but Bacquie did not do so until he was escorted out by Thomas J. Smith and other members. (Tr. 572.)

Chris Fitzsimmons also testified regarding the September 23 meeting, and stated that he was present during the interaction with Bacquie after the meeting ended. (Tr. 491–492.) Chris testified that during the incident, Richard Fitzsimmons, Jr. never threatened anyone that they would no longer obtain employment, including through the loss of Union membership. (Tr. 491–493.)

Thomas J. Smith also testified regarding the events of the September 23 meeting, which he attended. Smith testified that his

<sup>7</sup> Local 147 contends that at 52:32 Chris Fitzsimmons states, “I’m taking it that way,” as opposed to, “I’ll take it that way.” After listening to the recording multiple times, I agree.

<sup>8</sup> Bacquie testified that one of the members that pulled him away was Thomas J. Smith, who also testified at the hearing. (Tr. 74–76, 185.)

<sup>9</sup> “Yeah, go fuck yourself...come—you threatened me, come outside,” “We’ll settle it, you’re right, we’ll settle it, you’re fucking with the wrong one,” “Then the fucking son comes and acts like a tough guy,

the both of them. I’ll smack them both up by myself.” (GC Exh. 16(a), 16(b), p. 6–7.)

<sup>10</sup> “C’mon man . . . it’s over, bro, come on,” “Come on...it’s not worth it like this, you know that,” “Where is that gonna get you?” “It’s not even worth it,” “Richie, Richie go in your car and go home.” (GC Exh. 16(a), 16(b), p. 6–8.) Bacquie responded to one such statement, “I’m going to tell them, this is how stupid they are. I recorded the whole thing.” (GC Exh. 16(a), 16(b), p. 8.)

relationship with Bacquie was cordial, and he considered Bacquie a friend. (Tr. 599.) Smith also grew up with Chris Fitzsimmons and has known the family for a significant period of time. Tr. 608. Smith testified that Bacquie approached Chris Fitzsimmons while Chris was standing at the front of the room. (Tr. 600–601.) Smith was about ten feet away from Chris and Bacquie during their interaction. (Tr. 201.) Smith testified that Bacquie “stepped in Chris’s face,” and both were yelling, making him concerned for Chris’ physical safety. Tr. 602. Therefore, he tried to step in between Chris and Bacquie to defuse the situation. (Tr. 601–602.) Richard Fitzsimmons, Jr. was behind Chris, to the right of the door. (Tr. 603.) Smith testified that he never heard Richard Fitzsimmons, Jr. threaten anyone that they would no longer obtain employment, including by a loss of Union membership, during the incident.<sup>11</sup> (Tr. 603–604, 605.) However, Smith admitted that after the September 23 meeting ended a number of people were speaking simultaneously, and he could not understand everyone’s statements. (Tr. 617.)

*D. Events Occurring Between the September 23 and October 28 Union Meetings*

After the union meeting and subsequent confrontation on September 23, Bacquie and Chris Fitzsimmons had the following exchange of text messages:

Bacquie: You and your family fucked up, I’m going to the news and the International tomorrow, threatening me, your nephew saying I’m dead, I tried to approach you as a friend, but I guess we never were (6:05 p.m.)

Chris: Rich, I feel you fucked me and my family, go wherever you think you need to go. Look at your last text where you called me a liar. Friend? (6:37 p.m.) This is my personal cell phone, all future correspondence should be sent in writing to the hall. I will no longer be responding via text message (6:41 p.m.)

Bacquie: Sad you feel that way no problem

(GC Exh. 7 (punctuation and capitalization added for clarity).)

Bacquie testified that a couple of days after the September 23 meeting, he called the Laborers’ International Union of North America in Washington, DC, and was referred to a Regional Director in Rhode Island. (Tr. 82.) Bacquie testified that during this conversation he described his history with Local 147 and read the Regional Director the letter he had sent. (Tr. 83–84.) Bacquie further told the Regional Director that Richard Fitzsimmons, Jr. had threatened that Bacquie would never work again and was out of the Union, and that Joseph Fitzsimmons told Bacquie that he was dead and done in the Union. Tr. 84. According to Bacquie, the Regional Director asked whether he wanted to transfer to another LIUNA local, but Bacquie stated that because he had so much time in Local 147 he would prefer to have the issue corrected. (Tr. 84.) The Regional Director stated that he would call Local 147 to find out what was going on and contact Bacquie afterwards. (Tr. 84.) When Bacquie spoke to the Regional Director again, the Regional Director said

that a representative from Local 147 had told him that they didn’t know where Bacquie’s issues were coming from, that they liked Bacquie and wanted to handle things internally. (Tr. 105–106.) Bacquie told the Regional Director that Local 147 could not be trusted to handle the issue internally, and that he would proceed with filing a complaint. (Tr. 106–107.)

On September 25, Richard Fitzsimmons, Sr. wrote to Bacquie acknowledging receipt of his September 19 letter. Tr. 78–79. (GC Exh. 9.) Richard, Sr. stated that Bacquie’s letter would be addressed at the next Executive Board meeting on October 28, and the Board’s findings would be communicated to Bacquie in writing the following day. (GC Exh. 9.) On September 26, Bacquie e-mailed a copy of his September 19, 2018 letter, with minor grammatical corrections, to the e-mail address of Richard, Sr. which appeared on his letter to Bacquie. (Tr. 79–82; GC Exh. 10.) On September 27, Chris Fitzsimmons sent Bacquie an email regarding the documents Bacquie had requested, attaching his own March 8, 2016 email discussed previously:

Please see the e-mail with the document request from 2016. The new contract that was ratified on Sunday is still in draft form, so I am unable to distribute at this time. Once the General Contractor Association finalizes and prints copy I will forward it at your request. Rich has sent you a response to your later Dated September 23, 2018. I will now put your most recent letter on the agenda for the next Executive Board Meeting and a response will be mailed to your address on record the following business day. You were advised of the changes to the contract at the last meeting which you attended, approved ratified.

(Tr. 461–462, 465, 468–471; R.S. Exhs. 5, 10.)

On October 2, Bacquie sent another e-mail to Richard Fitzsimmons, Sr., stating that he never asked for an investigation by the Executive Board, “as I was never made clear their authority and who they are.” (Tr. 91–92, 94; GC Exh. 11(a).) Bacquie further stated that “If you, your son are part of this board along with your brother and any other affiliate who allowed the violations mentioned then there is a definite conflict of interest issue here legally.” (GC Exh. 11(a).) Bacquie stated that he had not received any of the materials he had requested, and stated that “the administration seeks to hinder the possession of these documents.” (GC Exh. 11(a).) On October 5, Richard, Sr. responded, stating that all grievances regarding the Union and its representatives, including Bacquie’s, are referred to the Executive Board for a review and response. (Tr. 91–92, 94; GC Exh. 11(b).) Richard, Sr. invited Bacquie to forward any additional concerns to him in writing, for submission to the Executive Board. (GC Exh. 11(b).)

On October 9, Bacquie e-mailed Richard Fitzsimmons, Sr., stating that his correspondence was “not and should not be treated as a grievance since I have not been given proper grievance policy and procedure after several attempts to obtain such.” (Tr. 96–98, 101; GC Exh. 12.) Bacquie stated that if he did not receive the documents he requested the following week, he would “file appropriately with the needed government agency,

<sup>11</sup> Smith testified that at a Local 147 meeting on October 27, 2019, Bacquie approached him and told him to “be careful what you say,” or “watch what you say.” Tr. 606. Smith testified that he assumed Bacquie

was referring to the hearing in the instant case, and shook his head and walked away. (Tr. 607.)

as I have been threatened by you and your family and openly denied further employment.” GC Exh. 12. Bacquie concluded, “This is the third time I have been threatened, I will take this a sense for extreme precision from this point on, as the words “I am DEAD” came from the mouth of your son the SGT at Arms Richard Fitzsimmons Jr.” GC Exh. 12. On October 17, Bacquie sent a letter to Local 147 by e-mail and regular mail, stating that his letters did not constitute grievances, since he was not aware of the grievance process. Tr. 98-101; GC Exh. 13. Bacquie further stated that he had not received any of the documents he requested except for a collective bargaining agreement dated 2014. GC Exh. 13

On October 18, Cindy Fitzsimmons responded for Local 147, stating as follows:

I am in receipt of your October 17, 2018 e-mail and recent letter. I would like to reiterate that you have been emailed the 2014 to 2018 contract. The 2018-2022 final draft has not been distributed yet from the General Contractor Association as it was ratified at the last meeting. I have reached out to GCA and will provide you with a copy as soon as it is finalized. You have also been sent a link in prior emails for the LIUNA Constitution which contains bylaws, officer duties, and grievance procedures. You can also find the entire constitution online if you are unable to follow the link. Your communications to the Local Union have been placed on the agenda for the next Executive Board meeting and will be addressed accordingly.

GC Exh. 12. On that same day, Chris Fitzsimmons forwarded Bacquie an e-mail from John Murray of the GCA, stating “RE: Agreement,” and “we are still in the process of reviewing the draft and will send comments/feedback when finished.” (Tr. 101, 471-473; GC Exh. 13; R.S. Exh. 11.) Chris Fitzsimmons testified that he forwarded the e-mail from Murray to show Bacquie that the GCA was still working on the language for the successor agreement. (Tr. 471-472.) Bacquie sent an e-mail to Chris Fitzsimmons in response stating:

This is in regards to which matter?

And for the record, there are no other policies, codes of conduct, terms, contracts and/or but not limited to documents regarding the members of local 47 employment, family matters, funds, children and/or sibling membership, deceased parents resulting in on job incidents etc.?

The only documents afforded is the collective bargaining agreement between the membership? and the General Contractors Association?

Tr. 101-104; GC Exh. 14; R.S. Exh. 11. On October 19, Chris Fitzsimmons responded as follows:

This is in regard to the current agreement between the GCA and Local 147 which was ratified at the last meeting. I have attached the Uniform Local Union Constitution from the International Constitution (The link to the documents was sent on at least two prior occasions). Please reference Article XI for charges, trials and appeals. Please direct future correspondence to Recording Secretary Gerard Schnell and President John Ryan in accordance with Article XI, Section 1.

(GC Exh. 14; see also Tr. 473-475, 478; R.S. Exh. 12.) Ten minutes later, Bacquie sent Chris Fitzsimmons an email requesting contact information for Schnell and Ryan, and fifteen minutes after that, Chris sent Bacquie addresses for Schnell and Ryan at the Local 147 office. GC Exh. 14.

Bacquie testified that some time in October 2018 he went to the Local 147 office, where Chris Fitzsimmons and John Ryan were present. Tr. 107. Bacquie asked Chris where the out-of-work list was, and Chris directed him to a stand with a book where he filled out his information. Tr. 41, 107, 330-331. Bacquie testified that he told Chris that they needed to have a civil exchange about the letter, and Chris said you could be recording me. Tr. 107-108. Bacquie stated that he was in fact recording them. Tr. 108. Ryan then said that he talked to the Regional Director and told the Regional Director that he liked Bacquie and didn't understand what was going on. Tr. 108. Bacquie responded that they needed to talk about the letter, and Ryan said that they could not do so. Tr. 108. Chris Fitzsimmons, who was then sitting at a nearby desk, stated that Bacquie and Ryan were making too much noise for him, and told Bacquie to get out. Tr. 108. Bacquie stated that it was his union hall also. (Tr. 109.) Bacquie testified that Chris made a statement to Ryan about getting Bacquie to leave, and Bacquie said to Ryan, “What are you his puppet?” (Tr. 109.) According to Bacquie, he then called Chris an asshole, and Chris did not respond. Tr. 109. Ryan and Bacquie then walked outside.

Once outside, Bacquie turned off his recording device, and told Ryan, “we really need to talk about the letter.” (Tr. 109.) Ryan said that they could not talk about the letter because it would “rile guys up.” (Tr. 109.) Bacquie said that if people became upset it was Ryan and the Sergeant-at-Arms' job to keep them in check. Ryan said that they could not discuss the letter that day, and Bacquie said that he was going to bring it up at the meeting. (Tr. 110.) According to Bacquie, Ryan then said that if things got riled up he was going to throw people out of the Union, and Bacquie responded that the Business Manager would be the one getting riled up. Tr. 110. Bacquie referred to his having been threatened at the September 23 meeting, stating that “once we talk about this letter, he's not going to stop. It's only going to get worse...you need to talk to him so that way we can have a civil conversation.” (Tr. 110.) At that point Ryan said that he needed to leave for a prior engagement, and the conversation ended. (Tr. 111.)

#### *E. The October 28 Union Meeting*

The October 28 union membership meeting also took place at the Teamsters meeting hall of 14th Street. (Tr. 111.) The Local 147 Executive Board members were present, including Ryan, Chris Fitzsimmons, and Richard Fitzsimmons Sr. and Jr. (Tr. 111-112, 553.) Local 147 member Tyrone Wallace made a recording of this meeting using Bacquie's phone, at Bacquie's direction. (Tr. 193-195, 271.) A copy of the recording and a transcript prepared by General Counsel were introduced into evidence during the hearing. (Tr. 214; GC Exh. 17(a-b).) During the meeting, Wallace was sitting at the front of the hall, while Bacquie stood at the back. (Tr. 195-197.) Wallace testified that he recorded the meeting continuously, without turning off the phone, pausing, or editing the recording. (Tr. 269-272.) He

returned the phone with the recording to Bacquie after the meeting ended. (Tr. 271–272.)

The recording begins with Richard Fitzsimmons, Sr.’s discussion of routine union business. After approximately one-half hour, Richard Sr. addressed the union’s policy prohibiting the recording of meetings.<sup>12</sup> (GC Exh. 17(a) at 34:45–36:45; GC Exh. 17(b) at p. 1–2; R.S. Exhs. 4.) During this portion of his presentation, Richard Sr. states that the union leadership was “always going to take the high road.”

After Richard Sr. concluded the Business Manager’s presentation, Ryan opened the floor to questions from the members, and the following exchange ensued:

Bacquie: Yeah, I have a question, uh. I sent a letter in, say in a September and it was addressed to the executive board. I also want to address about the recordings: what you said about the recording is untrue. It’s also not the right law that you’re bringing up but I’m not here to debate with you about that. What I do want to know is what the executive board came up with in regards to that letter that I sent you. And just for everybody’s own two cents. I sent the letter in asking for equality, some fairness, some fucking equal treatment.

Richard Fitzsimmons, Sr.: He opened it.

Bacquie: This is what I sent the letter in for. I wasn’t trying to be an asshole, wasn’t trying to be disrespectful or nothing. The situation happened between me and Chris. We had a discussion about the letter before it even got to the office. Am I correct on that?

Richard, Sr.: Um, I’m not going to start doing time frames.

Bacquie: Does it seem like . . .

Richard, Sr.: I’m just going to agree with you.

Bacquie: It seems like Chris got into his feelings and then things transpired between the rest of the family members.

Richard, Sr.: I don’t even have a clue what you are talking about, Rich.

(GC Exh. 17(a) at 54:36–55:44; GC Exh. 17(b) at 3.) Joseph Fitzsimmons then broke in, asking, “What’s not fair Rich, just tell us,” and Richard Sr. admonished him, stating, “I’m going to tell you something, Joe, please, he’s addressing me.” GC Exhs. 17(a), 17(b) at 3. Chris Fitzsimmons concurred, stating, “Let him speak, let him speak, he’s talking.” GC Exhs. 17(a), 17(b) at 3. Bacquie stated, “You said you we’re [sic] going to throw people out if it got out of hand,” and Richard Sr. responded, “We’re straight with it. We’re talking right now,”<sup>13</sup> Rich. I . . . Corrected. Go ahead, Rich.” (GC Exhs. 17(a) at 56:02; GC Exh.

17(b) at 3.)

The following exchange ensued:

Bacquie: I wasn’t trying to get stupid with anybody, with anybody here. I was actually pretty cordial with Chris although he thinks another facet of it happened. And other things were said to me that were damaging, I’m going to say that. But again, I was looking for some things, some equality. The points in that letter were never addressed by me in detail by me at all.

Richard Fitzsimmons, Sr.: That’s why we never addressed it.

Bacquie: So, you’re not going to address it?

Richard, Sr.: No, until you give us some detail. You just said it yourself.

Bacquie: Alright, I’ll send another letter.

Chris Fitzsimmons: Rich, Rich, May I?

Richard, Sr.: yeah.

Chris: You communicated us via certified mail?

[Crosstalk]

Chris: . . . with the Union via certified mail?

Bacquie: Uh, yeah, that’s right. However, I have two communications from you guys stating that you were going to address it here today.

Chris: No, no, at the executive board, this is a regularly [sic] membership meeting. In the letter that I sent you I told you . . .

Richard, Sr.: Yeah, we took care of it at the executive board meeting.

Chris: Hold on, I said that we will communicate with you in writing the next business day. I have the letter with me, you do want me to share it with the members.

Bacquie: Yeah, why not?

Richard, Sr.: OK, bring it up Chris.

Bacquie: Yeah, why not share it [with] the members, why don’t you read it off to them.

Richard, Sr.: Read it off.

Bacquie: So, you can have a better idea of what I was stating in the letter...of the letter that I gave. And please read the letter in its entirety.

Richard, Sr.: Chris, I wouldn’t do that, we answered him as an executive board.<sup>14</sup>

Bacquie: Alright, then I’ll read the letter off.

<sup>12</sup> On March 29, 2019, Bacquie amended the charge in Case 02–CB–231600 to include an allegation that Local 147 violated Section 8(b)(1)(A) by threatening legal action against members for making audio recordings of Union meetings. GC Exh. 1(c). The Regional Director approved a request to withdraw that allegation by letter dated May 2, 2019. R.S. Exh. 1. There is no evidence that Bacquie was disciplined by Local 147 for recording the September 23 or October 28 membership meetings.

<sup>13</sup> Richard Fitzsimmons, Sr.’s statement here is transcribed as, “We’re letting you talk, right now, Rich,” but after listening to the recording multiple times the statement is more accurately conveyed in the text above.

<sup>14</sup> Richard Fitzsimmons, Sr. was not at this point speaking in a raised voice, as Bacquie contended in his testimony. (Tr. 113–114.)



Richard, Sr.: Uh, Rich, I [sic] going to tell you . . .

Bacquie: I'm asking for the floor.

Richard, Sr.: Rich, Rich, I'm telling you the executive board addressed it, it's been, naw, it's done in a . . .

Bacquie: Are you telling me no? Are you telling me no?

Richard, Sr.: You can do it through writing. And this isn't a nomination or a convention or anything . . .

Bacquie: . . . nomination, listen, one thing you've got to . . .

[Crosstalk]

Chris: Keep it to the business at hand. Is this into reference anything that was discussed at the . . .

Bacquie: Can I finish speaking?

Chris: Go ahead.

GC Exh. 17(a) at 56:06-58:04; GC Exh. 17(b) at 3-5.

At that point, Richard Fitzsimmons, Sr. broke in, stating, "This is four meetings you disrupted, Rich." (GC Exh. 17(a) at 58:05; GC Exh. 17(b) at 5.) Bacquie responded, "Matter of fact, go ahead and name them. Did you log that down? Did your secretary log that down when I got attacked?" (GC Exh. 17(b) at 5. Richard Sr. then stated, "'I'm going to tell you guys something. I wasn't going to do this. Do you guys know that Richie's working currently, with us?'"<sup>15</sup> GC Exh. 17(a) at 58:20; GC Exh. 17(b) at 5. Richard Sr. and Chris Fitzsimmons stated that the Union had received reports indicating that Bacquie had worked in July, August and September 2018. GC Exh. 17(b) at 5. Bacquie responded, "Am I?" and "I'm not..." Richard Sr. called Bacquie a "lying s[ack] of shit," and Bacquie stated that he was "not working right now." GC Exh. 17(b) at 6. Richard Sr. stated that Bacquie possibly wanted "to trip this membership up because of your own anger," and reported that Bacquie made "2.2 million dollars in the last ten years," during which he had purportedly experienced discrimination in referrals. (GC Exh. 17(b) at 6.) Bacquie asked Richard Sr. how much he earned, and Richard Sr. responded, "It's on the fucking internet!" Bacquie then asked Ryan and Richard Fitzsimmons, Jr. to "check" Richard Sr. because "You're cursing now. I find that disruptive." (GC Exh. 17(a) at 59:18; GC Exh. 17(b) at 6.) Chris Fitzsimmons read the members Bacquie's reported hours for September 2018, during a period of time when members were calling in every three months to be placed on the out-of-work list, and Richard Sr. and Bacquie continued to argue the issue. (GC Exh. 17(b) at 7.) Bacquie and Richard Sr.'s voices become increasingly louder

and their tone becomes more agitated during this exchange. (GC Exh. 17(a) at 59:38, et seq.; GC Exh. 17(b) at 7.)

Richard Fitzsimmons, Sr. then told Bacquie that on Thursday "You came to the union hall, kissing ass," and Bacquie responded, "Oh, you're going to make this lawsuit great." (GC Exh. 17(a) at 1:00:02; GC Exh. 17(b) at 7.) Bacquie then stated, "Wait, you want to hear the recording?" and Richard Sr. responded, "You could record whatever you want." (GC Exh. 17(a) at 1:00:12; GC Exh. 17(b) at 7.) Joseph Fitzsimmons then broke in and yelled, "You bring recorders into the fucking meeting?" and Richard Sr. responded, "Shut Up!" (GC Exh. 17(a) at 1:00:17; GC Exh. 17(b) at 7.) Bacquie testified that Joseph Fitzsimmons "walked up to me aggressive," "in a threatening manner" as he made this statement. (Tr. 114-115.) Ryan and Chris Fitzsimmons then broke in, stating, "Alright, alright, enough, enough," and "Bring it back to order," respectively. (GC Exh. 17(b) at 7-8.) However, before the meeting could resume in an orderly fashion, the recording contains multiple, muffled voices speaking simultaneously, one of which states, "You're done."<sup>16</sup> (GC Exh. 17(a) at 1:00:43; GC Exh. 17(b) at 8.) Bacquie testified that at that point, Richard Fitzsimmons, Jr. told him, that he was "out of the fucking Union" and would "never work again," a statement which is not audible on the recording of the meeting and does not appear in the transcript. (Tr. 115.)

Richard Fitzsimmons, Jr. testified that he attended the October 28 meeting, and stood by the door closest to the podium, initially about ten to 25 feet from Bacquie. (Tr. 572-573.) Richard Jr. testified that he did not threaten Bacquie or any other member that they would no longer obtain employment, including via the loss of union membership, during the meeting. (Tr. 574-575.) Chris Fitzsimmons also testified that he attended the October 28 meeting, and was at the left of the room approximately five to ten feet from Bacquie and Richard Fitzsimmons, Jr. (Tr. 495-496.) Chris Fitzsimmons testified that Richard, Jr. did not threaten Bacquie that he would no longer obtain employment, including as the result of a loss of membership in the union, during any of the interactions which took place at the meeting. (Tr. 495-496.)

After the meeting resumed, Richard Fitzsimmons, Sr. described certain of Bacquie's social media posts, characterizing them as "anti-white," "anti-Catholic" and "anti-American," and speculating that such material could have a detrimental impact on the Union. (GC Exh. 17(a) at 1:00:45, et seq.; GC Exh. 17(b) at 8-9.) After arguing regarding the social media material, Richard Sr. and Bacquie proceeded to vociferously dispute Bacquie's history with the Union before resuming a contentious discussion of Bacquie's recent work which again descended into chaos. (GC Exh. 17(a) at 1:03:13, et seq.;<sup>17</sup> GC Exh. 17(b) at 8-11.)

Eventually, Local 147 member Sean Bishop stated, "Hey

<sup>15</sup> The evidence establishes that at the time of the September 23 and October 28 meetings only eight to ten members of Local 147 were employed in jobs covered by the Union's collective-bargaining agreements. (Tr. 493-495.) The number of members out of work was a significant issue for the Union, repeatedly mentioned during the membership meetings. See, e.g., Tr. 493-495; GC Exh. 17(b) at 1.

<sup>16</sup> General Counsel contends that this is the voice of Richard Fitzsimmons, Jr., while Local 147 claims that it is not. (GC Posthearing Br. at 15, 31; R.S. Posthearing at 7-8.) Having listened to the recording

multiple times and heard Richard Jr.'s voice in person at the hearing, I am unable to determine whether the voice which states, "You're done" at 1:00:43 on the recording of the October 28 meeting is that of Richard Fitzsimmons, Jr.

<sup>17</sup> It is not clear from the recording and the transcript whether Richard Fitzsimmons, Sr. is referring to Bacquie or member Orville Hodgeson as "a little fucking instigator" during this exchange. (GC Exh. 17(a) at 1:03:15-1:03:34; GC Exh. 17(b) at 9-10.)

Chris, who's taking the high road here, man?" and the following exchange ensued:

Bacque: . . . don't act like that.

Ryan: It's over, enough, enough.

Richard Fitzsimmons, Sr.: Act like your fucking balls. You attack me, my family, my fucking credibility!

Unidentified male voice: It's alright.

Bishop: What goes around comes around.

Richard Sr.: What are you talking about?

Bishop: That's not the way, man. Who's taking the high road here, guys?

Richard Sr.: Sean, Sean, Sean . . .

[Crosstalk]

Bishop: Yeah, but who's taking the high road, Rich...you're taking it so personal now. It's not a personal thing.

Richard Sr.: It's so personal, he called the international union. We've given him everything!

Bishop: Richie, you just said, Richie you just said the board is going to take the high road.

Richard Sr.: We are: we're not throwing him out of the union!

(GC Exh. 17(a) at 1:07:38-1:08:12; GC Exh. 17(b) at 13.)

Following additional heated discussion primarily involving Bacque and Richard Fitzsimmons, Sr., Chris Fitzsimmons made a report regarding Union financial issues, after which the hearing adjourned. (GC Exh. 17(b) at 14–16.)

#### F. Events Subsequent to the October 28 Union Meeting

On October 29, Richard Fitzsimmons, Sr. wrote to Bacque stating as follows:

The Executive Board of Local 147 has reviewed your letter dated September 19, 2018 wherein you have listed concerns.

The Board has determined there are no specific details as to the events which give rise to the alleged complaints.

Without specific details as to how you as a member were harmed, the Board cannot determine the validity of the complaint nor how to correct the alleged violation.

The Board requests specific details from you as to event[s] that occurred which is reason for your complaint.

Upon receipt of the information the Board will review same and respond to you.

(Tr. 126; GC Exh. 15.)

### III. DECISION AND ANALYSIS

#### A. The Alleged Agency Status of Richard Fitzsimmons, Jr.

The Amended Complaint alleges at Paragraph 4 that Richard Fitzsimmons, Jr. was at all material times an agent of Local 147 pursuant to Section 2(13) of the Act. General Counsel makes

two arguments in support of this allegation, contending that Richard Jr. is a general agent of Local 147 based upon his actual authority as Sergeant-at-Arms, and that Richard Jr. had apparent authority to engage in conduct on behalf of Local 147 at the membership meetings. (Posthearing Br. at 26–29.) Local 147 contends that Richard, Jr. is not an agent of the Union. (Posthearing Br. at 13, fn. 9.)

The record evidence establishes that Richard Fitzsimmons, Jr. is an agent of Local 147. At all material times, Richard, Jr. was Local 147's Sergeant-at-Arms, and therefore a member of the Union's executive board. It is well-settled that the "holding of elective office" constitutes "persuasive and substantial evidence" of agency status" which is "decisive absent compelling contrary evidence." *Security, Police and Fire Professionals of America (SPFPA) Local 444*, 360 NLRB 430 fn. 1, 436 (2014) ("The Board regularly finds elected or appointed union officials to be agents of that organization"); see also *Teamsters Local 705 (K-Mart)*, 347 NLRB 439, 441 (2006). Pursuant to the Union's Constitution, the Executive Board constitutes the Union and conducts its business between meetings, serves as a trial board to hear and determine charges against members, hires Field Representatives and Organizers, and ensures that the Union's business is being conducted in accordance with the Constitution. The Board has determined that a member of a similarly empowered executive board was an agent of the Union pursuant to Section 2(13). *Electrical Local 453 IBEW NECA*, 258 NLRB 1427 (1981), enfd. 696 F.2d 999 (8th Cir. 1982). Local 147's contention that Richard, Jr. was not an agent of the Union because he is a non-voting member of the Executive Board is not convincing in this context. See *IBEW (NECA)*, 258 NLRB at 1427–1428 (finding that Executive Board member's "inactive" status did not obviate his authority and status as an agent of the union).

I further find that Richard Fitzsimmons, Jr. had apparent authority to act as an agent of Local 147 at the September 23 and October 28 membership meetings. Pursuant to the Local 147 Constitution, Richard, Jr., as the Sergeant-at-Arms, was responsible for determining "the right of those who shall be permitted to enter the meeting hall," and for "execut[ing] such orders received from the President of the maintenance of order and decorum at meetings." (GC Exh. 4, p. 86.) Richard, Jr. testified that the Sergeant-at-Arms maintains order at meetings by issuing two warnings to disruptive individuals and ejecting those who fail to comply with his directives. Furthermore, it is undisputed that many of the other Local 147 executive board members were present during both the September 23 and October 28 meetings, several of whom are members of the Fitzsimmons family. See *Electrical Workers Local 45*, 345 NLRB 7 (2005) (shop steward had apparent authority to act on Union's behalf while running meeting together with union business representative); *Automotive & Allied Industries Local 618 (Sears, Roebuck & Co.)*, 324 NLRB 865 (1997) (daughter of union's chief executive officer who "routinely" responded to members' questions regarding dues had apparent authority to speak for the union with respect to such issues). The evidence therefore establishes that Richard, Jr. had apparent authority to act on behalf of the Union during the meetings at issue here.

*B. The Alleged Threats Made by Richard Fitzsimmons, Jr.*

1. General principles governing credibility determinations

Evaluating the critical issues of fact in this case requires an assessment of witness credibility. Credibility determinations involve consideration of the witness' testimony in context, including factors such as witness demeanor, "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), *enfd.* 56 Fed.Appx. 516 (D.C. Cir. 2003); see also *Hill & Dales General Hospital*, 360 NLRB 611, 615 (2014). Corroboration and the relative reliability of conflicting testimony are also significant. See, e.g., *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials, and comparative vagueness insufficient to rebut more detailed positive testimony). It is not uncommon in making credibility resolutions to find that some but not all of a particular witness' testimony is reliable. See, e.g., *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014).

In making credibility resolutions here, I have considered the witnesses' demeanor, the context of their testimony, corroboration via other testimony or documentary evidence or lack thereof, the internal consistency of their accounts, and the witnesses' apparent interests, if any. Any credibility resolutions I have made are discussed and incorporated into my analysis herein.

2. General conclusions regarding witness credibility

General Counsel presented two witness to substantiate the Amended Complaint's allegations—Richard Bacquie and Tyrone Wallace. Local 147 presented four witnesses in support of its defense—Chris Fitzsimmons, Richard Fitzsimmons, Jr., Thomas J. Smith, and Michael Hunter.

Based upon the entire record and my observations of the witnesses, I simply cannot find that Richard Bacquie was a credible witness overall. The evidence establishes that Bacquie made recordings of the two different incidents during which the unlawful threats allegedly occurred, one with a recording device physically on his person. However, despite the raised voices and shouting which characterize both incidents, neither of these recordings contain the statements alleged to be unlawful, nor do the transcripts of the recordings prepared by General Counsel. (GC Exhs. 16(a-b), 17(a-b).) It is true that at some points in the recordings individuals are speaking simultaneously, and it is difficult to clearly discern all of the different statements being made. However, Bacquie's contradictory and sometimes

unsubstantiated testimony regarding the accuracy of the recordings, his own recollection of the incidents, and the discrepancies between them does not inspire confidence in his contention that the unlawful threats actually occurred. At times, Bacquie's testimony was flatly belied by the recordings themselves. For example, when testifying regarding the September 23 meeting, Bacquie claimed that Joseph Fitzsimmons' statement, "You're dead; you're done in this Union" was actually audible on the recording at 53:45, although it was not transcribed. (Tr. 393, 396–397; GC Exh. 16(a-b).) Having repeatedly listened to the audio recording in evidence as General Counsel's Exhibit 16(a) at and around 53:45, it is simply not the case that this statement is audible, as Bacquie asserts.<sup>18</sup> Later in his testimony, Bacquie contended that the transcript entered into evidence as General Counsel's Exhibit 16(b) "has some typos," despite his admission that he had the opportunity to review the transcript, and ostensibly to correct any inaccuracies. (Tr. 394–395, 436438.) More importantly, however, listening repeatedly to the recording of the September 23 meeting establishes that the specific "typos" which Bacquie purportedly identified in the transcript<sup>19</sup> are not in fact errors at all. (Tr. 436–438; GC Exh. 16(a-b).) Bacquie also made contradictory assertions regarding the recordings and his independent recollection, variously claiming that the recordings are more accurate than his memory and that the recordings contain every factual detail of the September 23 and October 28 meetings to which he had testified.<sup>20</sup> (Tr. 378, 392–393.) These are far more serious issues involving recollection, and ultimately credibility, than a mere failure to recall the exact sequence of events, as Bacquie and General Counsel claim. (Tr. 378, 392; GC Posthearing Br. at 17–18.) They reflect poorly not only upon Bacquie's recollection but his capacity for truthfulness and undermine his credibility overall.

Bacquie's testimony was also at odds with the documentary evidence, and he altered his assertions repeatedly regarding such issues. For example, Bacquie claimed that he had never read the Union's Constitution and By-Laws, despite having requested them in writing in at least two heated exchanges with Local 147. (Tr. 301; GC Exhs. 8, 11(a), 12, 13; R.S. Exhs. 5, 10.) He initially claimed that this was because he had never received the Constitution. (Tr. 301–302.) When asked whether Chris Fitzsimmons informed him that he could obtain the Constitution through the LIUNA website, Bacquie said that he never attempted to do so because Chris did not provide him with the hyperlink. (Tr. 302.) When confronted with Chris' March 8, 2016 e-mail providing a hyperlink to the LIUNA website for the Constitution, Bacquie countered that Chris had not done so "recently," but then stated that "It's possible" that his testimony was incorrect. (Tr. 302–303; R.S. Exh. 10.) Later, Bacquie again

<sup>18</sup> In addition, in his October 9 e-mail to Richard Fitzsimmons, Sr., Bacquie claimed that Richard Fitzsimmons, Jr., as opposed to Joseph Fitzsimmons, told Bacquie, "You're dead." (GC Exh. 12.)

<sup>19</sup> Bacquie claimed that Thomas J. Smith did not say, "Rich, you're going to get locked up," and that his own statement, "I'm going to tell them this is how stupid they are. I recorded the whole thing" were inaccurately transcribed. (Tr. 436–438.)

<sup>20</sup> Bacquie also cast doubt on the quality of his own memory and capacity for accurately recollecting the events at issue here. When questioned on cross-examination regarding his independent recollection of

the September 23 meeting, Bacquie volunteered, completely unprompted, "Also I'd . . . like to note that when we [talk] about memory, I was assaulted by six cops, kicked in the head, so sometimes I might not all—but I took testing that would prove otherwise." (Tr. 400–405.) Bacquie went on to contend that "My memory is pretty much intact" according to testing performed around the time of that incident in 2014. Tr. 405–407.) Nonetheless, Bacquie himself raised the possibility that his memory had been impaired in response to questions regarding his independent recollection of the meetings.

denied receiving a hyperlink leading to the Constitution and by-laws, despite having been repeatedly sent one by Local 147. (Tr. 314; GC Exh. 12; R.S. Exh. 5, 10.) Finally, Bacquie was confronted with Chris Fitzsimmons' September 27 e-mail resending him the March 8, 2016 e-mail, which contained a hyperlink and instructions for locating the Constitution on the LIUNA website. (Tr. 316-317; R.S. Exh. 5.) While Bacquie claimed that he deleted the September 27 e-mail from his account and did not provide it to General Counsel, General Counsel immediately represented that Bacquie had in fact produced that e-mail in response to Local 147's Subpoena. (Tr. 317-318; R.S. Exh. 5.) Bacquie then claimed that he had not read the By-Laws, because although he had reached the LIUNA website, "It's very hard to find material," despite the explicit instructions for locating the Constitution and By-Laws contained in the Union's letters. (Tr. 315, 319-320; GC Exh. 12; R.S. Exhs. 5, 10.) Bacquie's repeatedly mutating contentions with respect to his own correspondence and document requests evince a propensity for untruthfulness and cast doubt upon the overall reliability of his testimony.

Bacquie also repeatedly offered speculative testimony and conjecture regarding events and the thoughts and motivations of other individuals which were clearly beyond his personal knowledge, even on direct examination. For example, Bacquie testified that in 2014, the president of Frontier-Kemper prevented him from being hired in connection with some sort of affirmative action effort that he was in fact entitled to participate in. (Tr. 36-39.) With respect to Local 147's process for selecting union officers, Bacquie claimed "there hasn't been one person there that's nominated," "either their father . . . appointed them . . . and then what happens is that they asked for two members to approve the appointment," despite documentary evidence that the Union followed a nominations process. (Tr. 47; GC Exh. 4, p. 91-98; GC Exh. 5.) Thus, Bacquie had to be repeatedly directed to respond to questions solely based upon his personal knowledge. (Tr. 64-65, 89.)

Finally, Bacquie was not merely evasive but obstreperous and combative with Local 147's counsel from the second question asked of him on cross-examination, when Bacquie refused to admit that he received Local 147's Subpoena, and then refused to admit that he ever read it. (Tr. 275.) When Bacquie was asked a short while later whether he had a problem with authority, he responded, "Why would you say that? Do you figure yourself as authority? Did I have a problem with you? I don't understand the question. Please elaborate." (Tr. 304.) Cross-examination regarding Respondent's Exhibit 4, Local 147's policy prohibiting the recording of membership meetings, devolved into a metaphysical conundrum:

Q: Okay. So it doesn't refresh your recollection —

A: No, sir.

Q: —of having knowledge of the fact that there is a policy against recording?

A: I was never given that, in hand, no.

Q: I didn't ask you if you were given it in hand.

A: Excuse me, sir.

Q: I asked you if you had knowledge of the policy.

A: To have knowledge of the policy—there was—no. I did not have knowledge of the policy because someone said something. No. That's not knowledge of.

Q: So somebody tells you we have a policy against recording, that doesn't establish that there is a policy, right?

A: That does not establish there's a policy.

Q: So in your mind, were told there's a policy, but you said because I don't see it in writing, there is no policy?

A: Because I don't see it in writing, it's not a policy

...

Q: Okay. And did you ask—well, you already said because you didn't see it, it didn't exist in your mind, correct?

A: Not in my mind. It doesn't exist. If you don't see something in writing, does it exist in your mind if you don't see it in writing?

Tr. 310-311. My multiple directives to Bacquie to simply answer the questions posed to him had no impact whatsoever. (Tr. 311, 355, 360, 391, 453; see, e.g., Tr. 313-314.) In fact, Bacquie proceeded to deploy this sort of rhetorical jujitsu when questioned regarding his own affidavit, creating a stand-off over a mundane and rudimentary issue which ultimately required my intervention:

Q: . . . Mr. Bacquie, when you came to the NLRB on one occasion or on many occasions, were you asked to sign an affidavit?

A: A blank affidavit, no.

Q: Were you asked to sign an affidavit?

A: A blank affidavit, no.

Q: Were you asked to sign an affidavit?

A: Your question is broad, overbroad. So again, a blank affidavit, no.

Q: Just again, do you know what an affidavit is

A: Please elaborate. I'm not an attorney.

Q: What is your perception of an affidavit?

A: A legal document.

Q: That has what on it?

A: A legal document that will be presented to the court.

JUDGE ESPOSITO: Are you asking him about the affidavit he gave in this case. Were you — did you prepare an affidavit with the Board agent and sign it

THE WITNESS: He prepared it. He prepared some documents—

JUDGE ESPOSITO: Right.

THE WITNESS: —asked me to sign them, yes, Your Honor.

(Tr. 384-385.) Bacquie's consistent refusal to respond in a

straightforward manner to the questions posed to him on cross-examination further undermines his credibility and the reliability of his testimony.

It is important to note that in evaluating Bacquie's credibility as a witness, I have not considered certain evidence which Local 147 argues is relevant for the purposes of impeachment. In particular, Bacquie's conviction in 2002 for fraud and related activity in connection with an access device has not entered into my analysis. (See Tr. 325–326, 328–329, 348–349.) Pursuant to Federal Rule of Evidence 609(b), where a witness' conviction and release from confinement took place more than ten years prior to the testimony at issue, the conviction is admissible "only" where its "probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." See also *Zinman v. Black & Decker, Inc.*, 983 F.2d 431, 434 (2d Cir. 1993) (convictions over ten years old admitted only "very rarely and in exceptional circumstances"). The evidence here indicates that Bacquie pled guilty to producing, selling, or possessing access devices configured to obtain telecommunications services without authorization, "knowingly and with intent to defraud," as part of a conspiracy. (Tr. 325–326, 348–349; see 18 U.S.C. §§ 1029(a), 1029(b)(2), 1029(c)(1)(A)(ii).) Local 147 therefore correctly contends that this conviction involves "a dishonest act or false statement" on Bacquie's part pursuant to FRE 609(a)(2). In addition, Local 147 reasonably asserts that a determination in the instant case is almost entirely dependent upon Bacquie's credibility, and that the federal courts have admitted over-aged convictions in such circumstances. See, e.g., *U.S. v. Payton*, 159 F.3d 49, 57–58 (2d Cir. 1998) (witness' overage conviction for making a false statement under oath and larceny admissible where her testimony was "critical" to the outcome); *Zinman*, 984 F.2d at 433–434 (overage conviction for Medicare fraud admitted where credibility "highly relevant to several disputed issues in the case"). However, here there is sufficient information to make a resolution as to Bacquie's credibility based upon Bacquie's testimony, the recordings of the September 23 and October 28 meetings with their transcriptions, and other documentary evidence, as detailed above. Such material is substantially more probative with respect to the overall reliability of Bacquie's testimony in this case than his 2002 conviction

involving a dishonest act or false statement. As a result, given that fifteen years have passed since the conviction and the release date, I find that overall the probative value of Bacquie's 2002 conviction with respect to his credibility as a witness is negligible.<sup>21</sup> See *U.S. v. Babb*, 874 F.3d 1027, 1029–1030 (8th Cir. 2017) (evidence of conviction cumulative given other evidence pertinent to witness' credibility); *U.S. v. Wilson*, 715 F.2d 1164, 1173 (7th Cir. 1983) (same).

General Counsel also presented Tyrone Wallace as a witness in support of the Amended Complaint's allegations. However, I cannot find that Wallace's testimony is reliable for the purpose of establishing the alleged violations. Wallace was asked whether he attended a Local 147 meeting in September 2018, and subsequent questions on direct examination ostensibly addressed that meeting. Tr. 232, et seq. However, it was clear from Wallace's testimony that he was describing the October 28 Union meeting, as opposed to the meeting which took place on September 23.<sup>22</sup> Furthermore, when describing the unlawful threat alleged in the Amended Complaint, Wallace testified that Joseph Fitzsimmons, and not Richard Fitzsimmons, Jr., said, "You're not going to work here no more." (Tr. 236.) Only in response to patently leading questions on redirect examination did Wallace testify that the meeting he was describing took place in September 2018, and that the individual who made the threatening statement to Bacquie was Richard Fitzsimmons, Jr., and not Joseph Fitzsimmons. (Tr. 268.)<sup>23</sup> Such testimony is simply not probative with respect to the allegations that on September 23 and October 28, Richard Fitzsimmons, Jr. threatened members that they would no longer obtain employment, including by loss of Union membership, in retaliation for their complaints of racial discrimination in referrals.

General Counsel contends at page 22 of his posthearing brief that Wallace's testimony is particularly reliable because he is current member of Local 147, and therefore testified against his own pecuniary interests in contradicting the testimony of the Union's officers. The Board has held that "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1, enf'd. 468 F.3d 1038

<sup>21</sup> In evaluating Bacquie's credibility I also decline to consider the testimony of Michael Hunter, a foreman at Remsco, regarding Hunter's aversion to working with Bacquie after a verbal confrontation between them. Federal Rule of Evidence 608(b) prohibits the use of extrinsic evidence to "prove specific instances of a witness's conduct" unless they are probative of the character for truthfulness or untruthfulness. I do not find Bacquie's conduct in this regard tends to establish a predisposition for untruthfulness. See *Erikson's, Inc.*, 366 NLRB No. 171 slip op. at 1 fn. 2 and at 5 (2018), enf'd. 929 F.3d 393 (6th Cir. 2019) (ALJ appropriately prohibited questioning regarding witness' discharge from employment as a police officer); *Operating Engineers Local 17 (Hertz Equipment Rental)*, 335 NLRB 578, 583 fn. 11 (2001).

<sup>22</sup> For example, Wallace testified that during the meeting Richard Fitzsimmons, Sr., gave Bacquie the floor, after which Bacquie addressed the letter he had sent to the Union office. Tr. 235. Wallace further testified that Joseph Fitzsimmons told Bacquie, "I gave you your first job," and that during the meeting Richard, Sr. stated that he was taking the high road by not kicking Bacquie out of the Union. Tr. 237. Wallace also testified that Joseph Fitzsimmons and Richard, Jr. confronted Bacquie

while Bacquie remained at the back of the room, and Chris Fitzsimmons inserted himself between them. Tr. 236–237, 254–255. Finally, Wallace testified that Bacquie stated, "this is going to be a wonderful lawsuit." (Tr. 241.) The recordings, transcripts and testimony establish that all of these events took place at the October 28 meeting, and not at the meeting on September 23. (See GC Exhs. 16(a-b), 17(a), 17(b) at p. 7, 10, 13.)

<sup>23</sup> Q: You were present during Union—a Union membership meeting, again, in September of 2018, right?

A: I believe it's — that's the date, yeah. I don't know a date. That is the date, yeah.

Q: And you testified about a statement made by Richard Fitzsimmons, Jr., at that meeting —

A: Um-hum. Yes.

Q: —to Richie Bacquie.

A: Yes.

Q: All right. You heard Mr. Fitzsimmons, Jr.—Richard Fitzsimmons, Jr., make that statement, is that correct?

A: Yes.

(7th Cir. 2006), quoting *Flexsteel Industries*, 316 NLRB 745 (1995), *affd.* 83 F.3d 419 (5th Cir. 1996) (emphasis added); see also *Covanta Bristol, Inc.*, 356 NLRB 246, 253 (2010). However, General Counsel does not provide any authority for applying this principle in the context of a union member whose testimony contradicts the testimony of union officers at trial. Nor does General Counsel elucidate any basis for comparing the potential impact of a labor union's conduct, as opposed to an employer's, on an employee's pecuniary interests. At the hearing General Counsel contended that Local 147 "has some real level of control over members' employment through its maintenance of an out of work list and other informal referrals that it makes," but repeatedly contended that the non-exclusive status of the Union's out-of-work list was irrelevant. (Tr. 627; see also Tr. 29–30, 328–329, 558, 627.) However, the Board has long held that a union which operates a non-exclusive hiring hall "lacks the power to put jobs out of reach of employees," so that a member's testimony might not necessarily implicate a pecuniary interest in such a context. *Stage Employees LATSE Local 142 (Various)*, 361 NLRB 1398, 1401 (2014), citing *Carpenters Local 537 (E. I. duPont)*, 303 NLRB 419 (1991). Thus, I decline to find that Wallace's testimony is particularly reliable based upon General Counsel's assertion in this regard.

I note as well that Wallace admitted during his cross-examination that he had a closer personal relationship with Bacquie than he had initially claimed. (Tr. 240, 253–254.) Indeed, Wallace eventually stated that he had spoken to Bacquie the evening prior to his testimony regarding whether he would be attending the hearing.<sup>24</sup> (Tr. 269–270.) I do not credit Wallace's assertion that he could not recall anything said during this conversation, which had taken place the previous evening. Tr. 270. While I find this material relevant to the ultimate reliability of Wallace's testimony, it is less significant than his apparent confusion of the September 23 and October 28 meetings and his identification of Joseph Fitzsimmons, as opposed to Richard Fitzsimmons, Jr., as the individual who told Bacquie that he would "not work here anymore." For those reasons in particular, I find Wallace's testimony less than probative with respect to the Amended Complaint's allegations.

Local 147 presented three witnesses who testified regarding the events of the September 23 and October 28 meetings – Chris Fitzsimmons, Richard Fitzsimmons, Jr., and Thomas J. Smith. All of these witnesses when questioned on direct examination provided a description of their location during the relevant incidents but were asked for and provided only conclusory denials regarding Richard Fitzsimmons, Jr.'s alleged threatening statements to Bacquie. (See Tr. 492–496, 571, 575, 603–605.) The Board has previously found that general denials are less probative and insufficient to rebut more detailed testimony regarding an event or statement. *Precoat Metals*, 341 NLRB at 1150; see GC Posthearing Br. at 23–24. However, I find that this principle

is less significant here, given that a recording of both the September 23 and October 28 incidents exists which does not contain the remarks that Bacquie attributed to Richard Fitzsimmons, Jr.

I otherwise found that Chris Fitzsimmons' testimony was generally credible. Chris testified in a straightforward manner, providing complete responses and clear explanations of union policies and documents on both direct and cross-examination. I further note that while his interactions with Bacquie became heated during the September 23 and October 28 meetings, the recording and transcript also demonstrate that Chris repeatedly attempted to keep the meetings under control, maintain order and defuse confrontation. (See, e.g., GC Exh. 16(a), 16(b) at 3; GC Exh. 17(a), 17(b) at 3, 5, 8.) This is consistent with his written responses to Bacquie in both their 2016 and 2018 exchanges, which generally evince a good-faith effort to understand the issues raised by Bacquie and provide Bacquie with the requested information. (See Tr. 461–464, 467–475, 478; GC Exhs. 14; R.S. Exhs. 5, 10–12.)

I also found Thomas J. Smith to be a credible witness overall. Smith, a senior health and safety specialist with the New York State Laborers' Health and Safety Trust Fund and member of Local 147, attended the September 23 meeting. (Tr. 597–599–) While Smith testified that he had a long relationship with the Fitzsimmons family and with Chris Fitzsimmons in particular,<sup>25</sup> I also credit his testimony that he considered Bacquie a friend, which is consistent with his attempts to calm Bacquie down and prevent a physical altercation after the September 23 meeting. (Tr. 599, 608, 618–819, 622; GC Exh. 16(a), 16(b) at 4–5, 7–8.) I credit Smith's testimony that one of his objectives was to prevent police involvement which could have had negative repercussions for Bacquie personally. (Tr. 602, 622.) I also note that Smith admitted that after the September 23 meeting ended a number of people were speaking simultaneously, and he could not always understand what everyone was saying as a result. (Tr. 617.)

Richard Fitzsimmons, Jr.'s testimony was the briefest of the Local 147 witnesses who addressed the September 23 and October 28 meetings. Like Chris Fitzsimmons and Smith, after establishing his position during the meetings and the incidents Richard, Jr. was only asked for and provided only conclusory denials regarding his statements to Bacquie. (Tr. 571, 575.) Richard, Jr.'s testimony did not play a significant role in my ultimate determination as to whether he made the threatening statements alleged.

### 3. The alleged threats by Richard Fitzsimmons, Jr.

General Counsel contends that Richard Fitzsimmons, Jr. "unlawfully threatened Bacquie with loss of employment, including through loss of Union membership," after the September 23 meeting. Post-Hearing Brief at 29. In order to determine

<sup>24</sup> Wallace testified on September 5, 2019, the second day of the hearing. Bacquie's testimony had begun the previous day but had not yet concluded at the time that Wallace testified. There was no sequestration order entered in the case. Bacquie later testified based upon information contained in his phone that he also spoke with Wallace or exchanged phone messages on August 24, 25, and 28, 2019. Tr. 293–294.

<sup>25</sup> General Counsel contends that Smith was biased because he was appointed to a previous position as training director for the Local 147 Training Fund by the Fund's trustees, two of whom were Chris and Richard Fitzsimmons, Sr. Posthearing Br. at 24–25; Tr. 609–611. However, the Training Fund had three management and three labor trustees at the time, and there is no evidence that either Fitzsimmons had outsize authority among that group. Tr. 611.

whether a union agent's statement violated Section 8(b)(1)(A), the Board evaluates whether "under all the circumstances," the statement "would have a tendency to restrain and coerce employees" in the exercise of protected activity. *Branch 4779, National Association of Letter Carriers (Postal Service)*, 364 NLRB No. 57 slip op. at 1, fn. 1, and at 3 (2016), quoting *American Postal Workers Union*, 328 NLRB 281, 282 (1999). The Board applies an objective analysis to determine whether the statement at issue "can reasonably be interpreted as a threat." *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). In particular, the Board has long held that Union threats of economic reprisals and loss of employment violate Section 8(b)(1)(A). See *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1418, 1424 (2000); see also *Painters Local 466 (Skidmore College)*, 332 NLRB 445, 446 (2000) ("threats of economic reprisals" violate Section 8(b)(1)(A)); *Teamsters Local 823 (Roadway Express, Inc.)*, 108 NLRB 874, 875, 882 (1954), enfd. 227 F.2d 439 (10th Cir. 1955) (threats of loss of employment unlawful).<sup>26</sup> Furthermore, it is well-settled that a member's criticism of union officials in connection with their operation of a hiring hall or otherwise making referrals for work constitutes protected concerted activity.<sup>27</sup> See *LIUNA, Local Union No. 91 (Council of Utility Contractors and Various Other Employers)*, 365 NLRB No. 28, slip op. at 2 (2017) (union member's attempts "to press the union to change its policies, especially those policies affecting members' employment opportunities" protected under Section 7); *Electrical Workers Local 724 (Albany Electrical Contractors Assn.)*, 327 NLRB 730, 735–736 (1999).

Here, General Counsel contends that Local 147 violated Section 8(b)(1)(A) after the meeting on September 23 when Richard Fitzsimmons, Jr. told Bacquie that he was "done in the union" and "won't work again." General Counsel further contends that during the October 28 meeting, Richard Fitzsimmons, Jr. threatened that Bacquie was "out of the fucking Union" and would "never work again." I have discussed the overall credibility of the witnesses and the reliability of their testimony above, and for those reasons I cannot find that the testimony of Bacquie or Wallace constitutes an adequate basis for establishing that Richard Fitzsimmons, Jr. made the unlawful statements attributed to him, which are not audible in the recordings of the September 23 and October 28 meetings or contained in the transcripts of the meetings prepared by General Counsel. A closer analysis of the evidence regarding the meetings confirms that conclusion. See *Branch 4779, National Association of Letter Carriers (Postal Service)*, 364 NLRB No. 57 at p. 3 (surrounding circumstances

and context of the statement at issue pertinent to determine whether the remark was legally permissible or unlawfully threatening), citing *American Postal Workers Union*, 328 NLRB at 282.

For example, the evidence does not unequivocally establish that Bacquie and Chris Fitzsimmons were discussing Bacquie's September 19 letter during their initial encounter after the September 23 meeting, as General Counsel and Bacquie claim. (Posthearing Br. at 8–9; Tr. 70; GC Exh. 16(b), p. 1–2.) Nothing in that discussion specifically refers to Bacquie's September 19 letter, and Bacquie's statement—"if there's questions these guys don't understand it because I didn't even understand it neither"—makes it plausible that Bacquie and Fitzsimmons were referring to the altered holiday pay provisions of the contract Bacquie had asked about during the meeting, which would apply to all members. In fact, when Fitzsimmons asked Bacquie whether "you understand it now," Bacquie stated, "Yeah." Such a response would be inconsistent the fact that Bacquie ostensibly had yet to receive any of the documents or information requested in his September 19 letter. In addition, it is not plausible that Fitzsimmons would be attempting to hand Bacquie a copy of Bacquie's own September 19 letter during this interaction, as opposed to some other document.

Furthermore, while the evidence establishes that the discussion between Bacquie and Chris Fitzsimmons escalated somewhat after that point, the recording and transcript are not consistent with Bacquie's contention that Chris assumed a "fighting" or "threatening" stance after asking Bacquie, "What, you got a problem with me?" (Tr. 71; GC Exh. 16(a) at 53:08, 16(b), p. 3.) The recording does not indicate that Chris made this statement in a significantly louder voice than the volume that either he or Bacquie had been previously using, as Bacquie claimed. (Tr. 71–72; GC Exh. 16(a).) In addition, after Bacquie responds at a distinctly raised volume, "What, you threatening me?" Chris returns to a more conversational tone and states, "No, I'm asking you if you have a problem with me. Richie, you seem like you got a problem with me." (GC Exh. 16(a), 16(b), p. 3.) Chris Fitzsimmons' more conversational mien further undermines Bacquie's assertion that Chris had assumed a "fighting" or "threatening stance" seconds earlier.

Bacquie's account of the ensuing scuffle, during which Richard Fitzsimmons, Jr. allegedly made the threatening statements, is contradictory and not supported by the record evidence. As discussed above, Bacquie's contention that Joseph Fitzsimmons' statement, "You're dead; you're done in this Union" was audible on the recording at 53:45 is simply incorrect. (Tr. 393, 396–397;

<sup>26</sup> General Counsel relies primarily on *Operating Engineers Local 150*, 352 NLRB 360 fn. 3, 380 (2008), to argue that a union agent's threat of loss of employment violates Sec. 8(b)(1)(A). However, that case was issued during a period when the Board lacked a quorum, and therefore has no precedential value pursuant to *New Process Steel, LP v. NLRB*, 560 U.S. 674 (2010). See, e.g., *Poudre Valley Rural Electric Association, Inc.*, 366 NLRB No. 21, slip op. 1, fn. 1 (2018); *Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB 455, 462, fn. 20 (2012).

<sup>27</sup> Local 147 contends that the Richard Fitzsimmons, Jr.'s statements as alleged in the Amended Complaint do not constitute a violation of Sec. 8(b)(1)(A) because the dispute between Bacquie and the Union

concerned only internal matters. However, Bacquie's September 19 letter addressed discrimination in the Union's out-of-work list and in the enforcement of its collective bargaining agreements by shop stewards, and Richard Jr.'s alleged statements pertained to Bacquie's future employment. As a result, the instant case involves Union conduct affecting "the employment relationship," as opposed to "wholly intraunion conduct and discipline." *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB at 1418. Contrary to Local 147's contention, Bacquie's employment status and the work available within the Union's jurisdiction at the time of the hearing are irrelevant to determining whether the statements made were coercive. R.S. Post-hearing Br. at 17, fn. 11.

GC Exh. 16(a-b).) Furthermore, two weeks after the meeting in an e-mail to Richard Fitzsimmons, Sr., Bacquie attributed this statement to Richard Jr., and not Joseph. (GC Exh. 12.) Richard Fitzsimmons, Jr.'s alleged statements that Bacquie was "done in the union" and "won't work again" do not appear on the recording or the transcript. (Tr. 73-74; GC Exh. 16(a) at 53:50-53:54; GC Exh. 16(b), p. 3-4.) General Counsel contends that Richard, Jr.'s statement "You're done! Get the fuck out of here" constitutes a "partial reflection" of the unlawful threat alleged. Post-Hearing Brief at 10. However, there is no indication, other than Bacquie's testimony, that Richard, Jr. was indicating by this statement that Bacquie would be ejected from the Union itself, as opposed to the meeting hall. See *Pacific Maritime Assn.*, 308 NLRB 39, 46 (1992) (union representative's statement not unlawful where reference to "causing trouble" was "so vague that it could mean anything," and in light of surrounding circumstances). Richard Fitzsimmons, Jr. testified that his statement referred to Bacquie's leaving the building, a more plausible interpretation given that by this point an entire group of Local 147 members was attempting to physically direct Bacquie toward an exit. (Tr. 572.)

The evidence regarding the allegedly unlawful statements made at the October 28 meeting involves a similar issue. Bacquie testified that in the midst of a scuffle during this meeting, Richard Fitzsimmons, Jr. stated that Bacquie was "out of the fucking Union" and would "never work again." (Tr. 115.) General Counsel contends that the recording and transcript of this meeting "partially corroborate" Bacquie's testimony in this regard, as they establish that Richard Fitzsimmons, Jr. told Bacquie, "You're done! [Indistinct]." Posthearing Brief at 31; (GC Exh. 17(a) at 1:00:43; GC Exh. 17(b), p. 8.) As discussed above, Local 147 denies that the voice making this statement on the recording is that of Richard Fitzsimmons, Jr., and based upon repeatedly listening to the recording and having heard Richard, Jr.'s voice during his trial testimony, I am unable to determine exactly who was speaking. However, even if Richard, Jr. made the statement, there is no evidence other than

Bacquie's testimony to establish that Richard Jr. was addressing Bacquie, as opposed to the several other members involved in the confrontation. Furthermore, the statement, "You're done!" is sufficiently vague that it could have referred to ending the altercation itself and maintaining order, which was Richard Jr.'s responsibility as Sergeant-at-Arms. *Pacific Maritime Assn.*, 308 NLRB at 46. Indeed, the recording and transcript indicate that immediately before and after the "You're done!" statement, Chris Fitzsimmons, John Ryan, and Sean Bishop attempt to defuse the situation by stating, "Bring it back to order," "Guys that's it, enough," "Order guys," and "It's over." (GC Exh. 17(a) at 1:00:22-1:01:00; GC Exh. 17(b), p. 8.) This context makes it more plausible that "You're done!" referred to participation in the altercation itself, rather than expulsion from the Union.

For all of the foregoing reasons, the evidence does not establish that Richard Fitzsimmons, Jr. threatened Bacquie with loss of employment, including by loss of membership, after the September 23 union meeting or during the Union meeting on October 28, in violation of Section 8(b)(1)(A) of the Act.<sup>28</sup> As a result, I will recommend that the amended complaint be dismissed.

#### CONCLUSIONS OF LAW

1. Northeast Remsco Construction, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 147, Laborers' International Union of North America (Local 147), is a labor organization within the meaning of Section 2(5) of the Act.

3. Local 147 has not violated the Act in any manner alleged in the Amended Complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended<sup>29</sup>

#### ORDER

The amended complaint is dismissed.

Dated, Washington, D.C. March 25, 2020

<sup>28</sup> In that the evidence does not establish that the alleged threats were made, I have not addressed the parties' arguments regarding repudiation or the appropriate remedy.

<sup>29</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.